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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 263

SHULIM WIXMAN, ALSO KNOWN AS SAMUEL MORRIS WIXMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (R. 38–43) is reported at 167 F. 2d 808. The oral opinion of the district court (R. 280–290), which constitutes its findings of fact and conclusions of law (R. 26, 290–291), is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 1948 (R. 44) and a petition for rehearing was denied on June 5, 1948 (R. 45). The petition for a writ of certiorari was filed on September 4, 1948. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a belief in the substitution of collectivism for capitalism in this country indicates a lack of attachment to the principles of the Constitution or an unfavorable disposition to the good order and happiness of the United States.

2. Whether the petitioner has borne the burden of proving his eligibility to citizenship by showing that he is attached to the principles of the Constitution and well disposed to the good order and happiness of the United States.

STATUTE INVOLVED

Section 307 (a) of the Nationality Act of 1940 (54 Stat. 1137, 1142, 8 U. S. C. 707 (a)) provides:

> (a) No person, except as hereinafter provided in this Act, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least five years and within the State in which the petitioner resided at the time of filing the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the

good order and happiness of the United States.

STATEMENT

Petitioner filed a petition for naturalization on September 25, 1945 (R. 3–4). At the hearing before the United States District Court for the Southern District of California on January 24 and 31, 1947, the Government opposed the application on the ground that petitioner was not attached to the principles of the Constitution and well disposed to the good order and happiness of the United States (R. 47–48). The evidence adduced at the hearing may be summarized as follows:

Petitioner was born in Russia in 1900 and was brought to this country by his mother in 1911. He attended public schools in New Haven, Connecticut, and in 1917 he entered Yale University (R. 177). While a student there, he served for several months as a member of the armed forces of this country at the army station on the Yale Campus, and received an honorable discharge (R. 177–178). After obtaining a degree from Yale in 1923, petitioner engaged in graduate study and taught history at the University of California (R. 178–179). He thereafter worked with a religious organization in San Francisco until 1929 (R. 179). During the following twelve years, he was an instructor in history and economics at the Los Angeles

Junior College (R. 179).[1] Since 1941, he has been employed in making studies and surveys for Jewish social organizations (R. 184). His wife and son are native-born citizens (R. 1, 234).

Petitioner testified that throughout the period from 1918 to 1941, he thought he was a citizen of this country by virtue of having participated, while in the army, in a proceeding which he was informed and believed conferred citizenship upon aliens who were serving in the armed forces (R. 179, 215). During that period, he was a registered voter (R. 213). In attempting to obtain a certificate of naturalization in 1941, he discovered that there was no record of any decree conferring citizenship upon him (R. 179).

One witness testified that at a meeting of teachers in 1934 or 1935, at which several state legislators were present, petitioner stated that "he was going to teach Marxism at the Junior College" (R. 50). The head of the department in which petitioner taught stated that it was his general opinion, gained from discussions of political and economic conditions with petitioner, that the latter "rather favored the ideology of Communism" (R. 70). A fellow instructor testified that many students at the college considered petitioner a "Red" (R. 73, 97–98, 104), that he was not merely discussing the various ideologies, but that the students sensed "that he was advocating or preach-

[1] Known during the latter portion of his tenure as Los Angeles City College (R. 179).

ing that particular type, finding the good points about it in contrast with our own" (R. 103). Several former students of petitioner during the 1930's testified that petitioner had expressed opinions and made references which were favorable to collectivism or communism and relatively unfavorable to capitalism (R. 56, 66). A former student testified that petitioner "mentioned that he was attending some kind of an evening school which taught communism, and he invited any who wished to attend to come along with him" (R. 61).

In 1934 or 1935, petitioner delivered a lecture on the campus to an audience composed of faculty members, students and others. In this lecture (R. 5–25), entitled "Economic Trends," petitioner discussed the maladjustments and inequities of unrestrained capitalism as shown by statistics on unemployment, inadequate housing, and lack of educational facilities in this country. He pointed out that capitalism had within it an inescapable tendency to generate depressions (R. 13–16). He examined alternative forms of economic organization, including state capitalism, fascism and, finally, collectivism. Quoting from an unidentified source, he said that proponents of the collectivist state propose that " 'all resources, all lands and buildings, all manufacturing establishments, mines, railroads and other means of transportation and communication should be, not private property but the common property of all those who work' "; that " 'society should consist only

of those who work, which means that all members of society should be socially useful human beings * * * that production be made to serve the needs of those who work, rather than to serve the needs of a few parasites' " (R. 20–21). Petitioner then adverted to the collectivist belief that bourgeois capitalism must be succeeded by " 'the dictatorship of the masses,' " " 'the change to be expedited and effected by the strong, determined, class-conscious part of the working class—' all workers or producers, or those laboring by brain or brawn—when a favorable opportunity presents itself" (R. 21). Since not all workers are capable in managing government and industry, there must be, during this second stage of the dictatorship of the masses, "an intelligent minority to pave the way by holding power and ruling with an iron hand till socialism is brought into being and all people are educated to its ideals" (R. 21–22). Finally, the third phase of collectivism—the socialist society—will emerge, in which " 'all means of production will be in the hands of the democratically governed state. The masses of workers will now be in control.' " As the final phase, petitioner said, there "will evolve the state known as Collectivism, a state which according to the prophetic, far-seeing vision of Karl Marx, is historically the logical outcome of a system of society that has outlived its usefulness, its mission, its place in history of economic growth of mankind" (R. 22).

Petitioner concluded the lecture by saying that he saw no hope for the fascist economy in Germany, Italy, and Japan and little hope for economic planning in England, France, the United States, "and other democratic and pseudo-democratic states." He stated that "the choice we are asked to make lies before us," and that "this study and reflection could lead one to conclude that progress, human well-being—civilization in brief, definitely and decidedly has little to fear, nay, it has much to expect, from a system of genuine socialization." (R. 23–24.)

The Government[1] introduced no testimony relating directly to petitioner's beliefs or behavior after 1940.[2] Former colleagues and students, neighbors, professional and business acquaintances, and members of veterans' organizations whose contacts with petitioner extended over many years testified in his behalf and vouched for his attachment to the principles of the Constitution (*e. g.*, R. 84, 91–92, 94, 115–118, 122, 149–154). Petitioner testified that he believed in governmental control of the means of production if it should be necessary to assure the greatest good for the greatest number (R. 225). He stated,

[2] Government counsel attributed the Government's inability to find witnesses who could testify as to anything petitioner had done or said during the five years preceding his application to the fact that petitioner's present position involved much travel and "he has not been in a position where he was expressing his views as he was as a teacher and as a lecturer" (R. 269).

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however, that his previous forecast of the doom of capitalism had been modified by the display of economic cooperation during the war and by the growth of producers' and consumers' cooperatives and he is now inclined to believe, although he is not certain, that capitalism with modifications can survive (R. 209).

The district court found that petitioner had not established that he is attached to the principles of the Constitution and well disposed to the good order and happiness of the United States, and, on that ground, denied the petition for naturalization (R. 26–27). The Court of Appeals for the Ninth Circuit held that this finding was supported by substantial evidence and affirmed the judgment (R. 38–43).

DISCUSSION

1. The opinion of the trial judge, which was affirmed by the Court of Appeals without discussion of the meaning of the statutory conditions upon naturalization, appears to be based on the theory that a belief in collectivism and a pessimistic attitude as to the survival of capitalism is inconsistent with attachment to the principles of the Constitution and a favorable disposition to the good order and happiness of the United States (R. 281, 286). If the petitioner's belief in the public ownership of the means of production (R. 208), his onetime view that capitalism could not survive (R. 209), and his present view

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that private ownership of property must give way to "the greatest good for the greatest number" (*ibid.*) are in no way inconsistent with the requirements of the Nationality Act (*supra*, pp. 2–3), the judgments of the courts below must be reversed whether or not there might be other grounds on which those judgments might be supportable. This is so because there are no separate findings of subsidiary fact, untainted by the view that a belief in collectivism without more is inconsistent with the statutory standards, upon which the judgments below might rest.

We agree with petitioner that an erroneous standard of law was applied by the naturalization court in making the finding of ultimate "fact." Cf. *Baumgartner* v. *United States*, 322 U. S. 665, 671. Although the view that a belief in the desirability of abolishing the institution of private property and substituting therefor a system of communal ownership is incompatible with the fundamental principles of the Constitution has found support in several decisions (*In re Saralieff*, 59 F. 2d 436 (E. D. Mo.); *In re Van Laeken*, 22 F. Supp. 145 (N. D. Calif.); *Ex parte Sauer*, 81 Fed. 355 (Tex.); cf. *United States* v. *Tapolcsanyi*, 40 F. 2d 255 (C. C. A. 3); *In re MacKay*, 71 F. Supp. 397 (N. D. Ind.)), we think this Court has clearly held to the contrary in *Schneiderman* v. *United States*, 320 U. S. 118. While that case involved a judgment of denaturalization, the Court's ruling seems inconsistent with the

view that the Nationality Act denies citizenship to those who believe in the substitution of collective ownership of the means of production for a capitalistic or free enterprise economy:

> * * * It is true that the Fifth Amendment protects private property, even against taking for public use without compensation. But throughout our history many sincere people whose attachment to the general constitutional scheme cannot be doubted have, for various and even divergent reasons, urged differing degrees of governmental ownership and control of natural resources, basic means of production, and banks and the media of exchange, either with or without compensation. And something once regarded as a species of private property was abolished without compensating the owners when the institution of slavery was forbidden.

Schneiderman v. *United States, supra,* at 141.

Although the principles of the Constitution to which an applicant for naturalization must be attached have not been fully delineated, we are satisfied, in the light of the *Schneiderman* decision, that a belief in the substitution of collective ownership of property for private capitalist ownership and control is within the permissible area of thought which is not a barrier to naturalization. The statutory conditions on admission to citizenship here involved "should be construed, not in opposition to, but in accord with, the theory and

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practice of our Government in relation to freedom of conscience." Chief Justice Hughes, dissenting, in *United States* v. *Macintosh*, 283 U. S. 605, 635, overruled in *Girouard* v. *United States*, 328 U. S. 61, 69. We agree with petitioner that the judgments below should not stand.

2. The problem of the order appropriately to be entered by this Court remains. Bearing in mind that in a case such as this—one arising out of an application for naturalization—the intensity of the applicant's attachment to constitutional principles should be closely scrutinized before citizenship is granted (*Baumgartner* v. *United States*, 322 U. S. 665, 675), and doubts resolved in favor of the United States (*United States* v. *Manzi*, 276 U. S. 463, 467), the Government is constrained to withhold its agreement with the petitioner's view that this Court should direct the entry of a judgment of naturalization.

It may well be that the district court, in attributing to the petitioner a belief in "collectivism," had in mind not merely an economic theory but the political philosophy which advocates attaining the collectivist society through the dictatorship of a minority of the people. In the course of his lecture, described in the Statement (*supra*, pp. 5–7), petitioner spoke of the collectivist's belief that society must go through four stages of development in the path from capitalism to socialism. The second stage he described as "the dictatorship of the masses," one

in which "there must be an intelligent minority to pave the way by holding power and ruling with an iron hand till socialism is brought into being and all people are educated to its ideals." (R. 21–22.) Thus it may be that the trial court was of the view that petitioner not only believed in, and taught the desirability of, radical changes in our economic structure but also that he believed in political changes of an antidemocratic character. Petitioner's exposition of Marxian doctrine, coupled with his reputation as a Communist, may have led to the drawing of an inference by the court that petitioner subscribed not only to the substantive goal, socialism, but also to the procedure by which the transition from capitalism to socialism would be effected, and thus that he countenanced the repression of the traditional freedoms guaranteed by the Constitution during the stage in which the proletariat would rule "with an iron hand" (R. 21–22). Specifically, the court may have concluded that the sincerity of petitioner's adherence to strictly constitutional methods of change was impeached by his acceptance of the necessity for—and, in view of the overriding *desideratum,* the desirability of—rule by a minority, if not initially, then at a subsequent stage in the transition, and a concomitant suppression of the civil rights of dissidents. And, in our view, such a belief in dictatorship would be inconsistent with attachment to the principles of the Constitution. Accord: *Stasiukevich* v. *Nicolls,* 168 F. 2d 474, 477–478 (C. C. A. 1).

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At the trial, the petitioner apparently disclaimed advocacy of such a dictatorship (R. 204), but the trial judge made no finding on the question. We believe that the question whether a finding of advocacy or belief in dictatorship could be sustained by the evidence, and the further question whether such a finding, if sustained, would support an ultimate finding that petitioner was not attached to the principles of the Constitution and well disposed to the good order and happiness of the United States during the crucial statutory period,[3] should be decided only if and when such subsidiary and ultimate findings are made and not before. Whether or not findings of subsidiary fact are mandatory in naturalization proceedings,[4] it would seem that in a case as fraught with delicate problems as is this and in the light of the course the proceedings already have taken, specific findings of fact would be in the interest of good judicial administration. *Stasiukevich* v. *Nicolls,* 168 F. 2d 474, 478 (C. C. A. 1).

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[3] Although, as the husband of an American citizen, petitioner need show only one year of residence prior to the filing of his petition for naturalization (Section 310 (a) of the Nationality Act of 1940, 54 Stat. 1144, 8 U. S. C. 710 (a)), he is nevertheless required to establish his attachment to the principles of the Constitution for at least five years, and for a longer period if deemed necessary by the naturalization court. Cf. *In re Laws*, 59 F. Supp. 179 (N. D. Calif.); *Petition of Ludecke*, 31 F. Supp. 521 (E. D. Mich.).

[4] Compare the view of the court below (R. 41–42) with *In re Murra*, 166 F. 2d 605 (C. C. A. 7).

A remand to the district court will enable that court to clarify its findings unencumbered by an erroneous view of the statutory conditions which applicants for naturalization must meet. The court would, in addition, be in a position to determine whether, in the light of the correct test, further evidence should be taken for the purpose of either amplifying or explaining the few items presently in the record which, while probably insufficient basis for the denial of naturalization as they stand, are sufficiently suggestive of a belief, by the petitioner, in a dictatorship incompatible with the principles of the Constitution to make further exploration and inquiry advisable.[5] Compare *Stasiukevich* v. *Nicolls,* 168 F. 2d 474,

[5] In addition to the evidence summarized in the statement (*supra*, pp. 3–8) which affords some support for the view that petitioner believed in dictatorial communism as a political philosophy and not merely in democratic "collectivism," note should be taken, for example, of petitioner's admitted membership in "The League Against War and Fascism" (R. 213). An organization with a similar name has been classified by the Attorney General as "Communist" under the powers vested in him by Executive Order 9835, 12 F. R. 1935, dealing with the loyalty of Government employees. See 13 F. R. 6137. Even if the organization mentioned is the same as that listed by the Attorney General, the fact of petitioner's membership, standing alone, "is simply one piece of evidence which may or may not be helpful in arriving at a conclusion" as to his loyalty or disloyalty. See Statement of the President dated November 14, 1947, quoted in 13 F. R. 254. We make mention of his membership only as some support for our view that further exploration into the issue of petitioner's loyalty would seem advisable. See also, note 6, *infra*. Cf. *Stasiukevich* v. *Nicolls*, *supra*, 168 F. 2d at 479–480.

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480, a case raising problems much like those here involved in which the Court of Appeals for the First Circuit remanded the cause not merely for more detailed findings on the existing record but for a retrial.

The trial court may also have based its decision in part upon its impression as to the credibility or incredibility of the testimony of the witnesses, including that of petitioner.[6] The ultimate findings of a naturalization court must often rest upon such imponderable factors, and explicit findings as to the trial judge's belief or disbelief of witnesses, with an explanation of why particular testimony was credited or rejected, would be helpful. As this Court has observed, findings on the question of attachment to constitutional principles and disposition toward the good order and happiness of the Nation may represent "the ultimate judgment on a mass of details involving not merely an assessment of the trustworthiness of witnesses but other appropriate inferences that may be drawn from living testimony which elude print." *Baumgartner* v. *United States,* 322 U. S. at 670. Certainly, "Appellate courts cannot make factual determinations which may be decisive of vital rights where the crucial facts have not been developed." (*Price* v. *Johnston,* 334 U. S. 266, 291.)

[6] See R. 205, where petitioner exhibited a somewhat suspicious humility with respect to his knowledge of the Russian situation.

The delay and inconvenience resulting to petitioner from a remand is, in our view, offset by the importance to the Nation of carefully screening applicants for admission to citizenship.

CONCLUSION

For the reasons stated, the Government suggests that a writ of certiorari issue, and that, without further argument (*Fogel* v. *United States*, No. 116, decided November 15, 1948) the judgment of the court below be reversed and the cause remanded to the district court for further proceedings not inconsistent with the view that a belief in economic collectivism in itself is not a barrier to naturalization.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

NOVEMBER 1948.

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